IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 476

IN THE MATTER OF

BLUE STAR AUTO STORES, INC., AN ILLINOIS CORPORATION,

Petitioner,

vs.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL E. HIRSCH,
JULIAN H. LEVI,
Counsel for Petitioner.

THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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The above named Petitioner respectfully petitions this Court to issue its Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and alleges as follows:

1. This Petition is filed pursuant to Rule 38 of the Rules of this Court to review the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming (with a slight modification not here

material) the Judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, enjoining your Petitioner under the provisions of the Fair Labor Standards Act;

2. This Court has jurisdiction over the subject matter of this Petition, pursuant to Section 240(a) of the Judicial Code as amended by Act of February 13, 1925.

SUMMARY OF THE MATTER INVOLVED.

This Petition presents the following questions:

1. Whether your Petitioner, whose only business is the sale of merchandise at retail through twenty-one retail outlets, eighteen of which are in the State of Illinois, and three of which are in the nearby part of the State of Indiana (Gary, Lafayette and South Bend), and who maintains in the City of Chicago an office and two warehouses, constitutes a retail establishment, under the reasoning of *A. H. Phillips, Inc.* v. *L. Metcalfe Walling, Adm. etc.*, 324 U. S. 490, so that Petitioner's office and warehouse employees are exempted under Section 13(a)(2) of the Fair Labor Standards Act of June 25, 1938;

2. Whether the defining of the word "establishment", occurring in Section 13(a)(2) of the Fair Labor Standards Act of June 25, 1938, so as to limit its meaning to a retail business conducted in a single building located near a state line, would be unconstitutional in failing to give equal protection of the law to retailers operating their business in more than one building, but otherwise conducting their business in the same manner as those operating in a single building;

3. Whether, under the rule laid down in *United States* v. *Ohio Oil Co.*, 234 U. S. 548, 562, the delivery by Petitioner from its own warehouse, by its own truck, to its own retail outlet in Indiana, for sale there in intra-state commerce, constitutes engaging in commerce or in the production of goods for commerce;

4. Whether, under the rule laid down in *Bozant* v. *Bank of New York*, 156 F. (2d) 787, 790, the office employees of

petitioner are engaged in commerce or in the production of goods for commerce;

5. Whether, under the holding of this court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692, the doctrine of *de minimis non curat lex* applies; and

6. Whether the Administrator sustained his burden of proof when he failed to introduce any evidence that (a) any of Petitioner's employees ever worked over-time, (b) any of Petitioner's office employees ever had any connection with the production of goods for commerce, (c) any of Petitioner's warehouse employees had any duties in connection with incoming merchandise, and (d) any of such warehouse employees were engaged in commerce or in the production of goods for commerce.

STATEMENT OF THE MATTER INVOLVED.

The sole business of your Petitioner is the sale at retail of its merchandise through eighteen retail outlets in the State of Illinois, and three in the nearby part of the State of Indiana, where such sales are made in intra-state commerce. (R. 11.)

In order to service such business, your Petitioner maintains an office and two warehouses in the City of Chicago where nine of the retail outlets are located. (R. 11.)

Even during the period from October 1, 1944, through March 31, 1945, when war conditions made it necessary to buy from every available source, your Petitioner purchased 60.29% of its merchandise from wholesalers and only 39.71% from manufacturers. Of the merchandise purchased from wholesalers, 92.33% was purchased from wholesalers in Illinois, and 7.66% from wholesalers outside of Illinois. Of the merchandise purchased from manufacturers, 58.81% was purchased from manufacturers in Illinois and 41.19% from manufacturers outside of Illinois. 78.67% was purchased from Illinois wholesalers and manufacturers and 21.33% from wholesalers and manufacturers outside of Illinois. (R. 13-4.)

During the calendar year 1943, Petitioner's sales were divided 77.91% through the Illinois outlets and 22.69% through its Indiana outlets. For the first quarter of 1941 the percentages were 74.79% in Illinois and 25.21% in Indiana. (R. 14.) Applying the latter percentage to the 21.33% of goods purchased from outside the State of Illinois, it would appear, in the absence of evidence on the subject, that 5.377% of goods purchased from outside the State of Illinois went to Indiana outlets.

The personnel of Petitioner's office force consisted of its Secretary (an exempt employee) who was the general manager, a book-keeper, a pay-roll clerk, a switchboard operator and a part-time stenographer. (R. 11.)

The Secretary made all purchases, forwarded to the warehouses requisitions from store managers and handled all correspondence not written by the part-time stenographer. (R. 11, 22, 44.)

Telephone calls were practically all local, calls to or from the Indiana outlets occurring only in case of an emergency, *not more than one a month*. Other long distance calls were *rare*. (R. 44-5.)

There was no evidence that the part-time stenographer ever wrote any letter to any point outside the state of Illinois. The duties of the bookkeeper and the payroll clerk were the usual clerical duties incident to the office of any retail establishment. (R. 11.)

At its 2010 South Wabash warehouse, Petitioner employed a manager, a receiving clerk, a packer, a pricer, two order-pickers and three part-time employees; at its 2235 South State Street warehouse, Petitioner employed a manager, two order-pickers and one other employee. (R. 28, 34-7.)

Petitioner employed two truck drivers, one for delivery to Chicago outlets and one for delivery to the stores outside of Chicago and the three Indiana stores. (R. 47, 49.)

Deliveries to the Indiana stores were made not oftener than once each week. (R. 37, 47.)

The Circuit Court of Appeals modified the injunction of the District Court so as to expressly exclude the truck driver delivering to the Indiana stores. (R. 91.)

There was no evidence that it was the duty of any warehouse employee to unload or assist in unloading an incom-

ing truck. When an article was too heavy for the driver of the incoming truck to unload unaided, some one or another of the warehouse employees, *as a courtesy* to the truck driver, and not as a part of the employee's duties, would assist him. (R. 31, 41.)

There was no evidence as to what percentage of incoming goods was heavy, or as to whether any of the heavy incoming goods were from within or without the State of Illinois, or as to whether any of the heavy incoming goods were sent to Indiana.

There was no evidence as to what part of the time of any warehouse employee was connected with deliveries to Indiana. Assuming that all warehouse employees participated to an equal extent, the work in connection with one warehouse was shared by a manager, five full-time employees and three part-time employees, and the work at the other warehouse was shared by a manager and three employees. There was no evidence as to how deliveries to Indiana were divided between the two warehouses. If it can be assumed that 9/13th went from the one warehouse and 4/13th from the other warehouse, less than 2% of each warehouse employee's time was connected with deliveries to Indiana, and less than *one tenth of one per cent* was connected with merchandise coming from without the State of Illinois and delivered to Indiana.

The Administrator introduced no evidence that any employee of Petitioner was engaged in commerce or in the production of goods for commerce.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The reasons relied upon for the allowance of a Writ of Certiarari herein are:

1. The Circuit Court of Appeals ignored this Court's decision in *A. H. Phillips, Inc.* v. *L. Metcalfe Walling, Adm. etc.*, 324 U. S. 490, which decision was based upon the fact that the Phillips Company had combined the functions of wholesaler and retailer. The Stipulation of Facts in this case stated that Petitioner purchased 60.29% of its merchandise from wholesalers and only 39.71% from manufacturers, and that, of this latter per cent, 58.81% was purchased from manufacturers in Illinois and only 41.19% from manufacturers outside of Illinois. Unlike the Phillips case, Petitioner's office and warehouse were not engaged in wholesaling, but simply were performing the same functions as the purchasing department of any retailer.

2. If Congress did intend, by its use of the word "establishment", to mean a retail business located in a single building, it would render Section 13 (a) (2) of the Fair Labor Standards Act unconstitutional under the due process clause of the Fifth Amendment to the Constitution, and would be discriminatory and deny equal protection of the law to retailers operating their businesses in an identical manner.

3. The Circuit Court of Appeals ignored this Court's decision in *United States* v. *Ohio Oil Co.*, 234 U. S. 548, 562, in which this Court held that in the case of a company owning oil wells in one state, a refinery in another state, and a pipe-line connecting the wells and the refinery, the use of the pipe-line did not constitute transportation or commerce.

4. The Circuit Court of Appeals refused to adopt the rule laid down in *Bozant* v. *Bank of New York*, 156 F. (2d) 787, 790, that the clerical work of office employees keeping records, of no value except as records, and having no connection with any merchandise, did not constitute commerce or the production of goods for commerce.

5. The Circuit Court of Appeals ignored the decision of this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692, holding that the doctrine of *de minimis non curat lex* applies to cases under the Fair Labor Standards Act.

6. The Administrator absolutely failed to sustain the burden of proof in that he failed to introduce any evidence that (a) any of the Petitioner's employees ever worked overtime, (b) any of Petitioner's office employees ever had any connection with the production of goods for commerce, (c) any of Petitioner's warehouse employees had any duties in connection with incoming merchandise, and (d) any of such warehouse employees were engaged in commerce or in the production of goods for commerce.

SUMMARY OF ARGUMENT.

I.

The office and warehouse employees are exempted from the provisions of the Fair Labor Standards Act by Section 13(a)(2) of said Act.

II.

If the word "establishment" in Section 13(a)(2) of the Fair Labor Standards Act should be limited in meaning to a retail business located in a single building, said section would be unconstitutional under the due process clause of the Fifth Amendment to the Constitution and would be discriminatory and would deny Petitioner the equal protection of the law.

III.

The sending by Petitioner from its own warehouses in Chicago, by use of its own truck, to its own stores in Indiana, of its merchandise to be sold at retail in intrastate commerce in Indiana, does not constitute commerce or the production of goods for commerce.

IV.

The work performed by the office employees (exclusive of the Secretary of Petitioner) does not constitute commerce or the production of goods for commerce.

V.

The doctrine of *de minimis non curat lex* applies to this case.

VI.

The Administrator did not sustain the burden of proof.

ARGUMENT.

I.

The Office and Warehouse Employees Are Exempted from the Provisions of the Fair Labor Standards Act by Section 13(a)(2) of Said Act.

Section 13(a)(2) provides that the provisions of Sections 6 and 7 shall not apply with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intra-state commerce."

The earlier decisions such as *Walling* v. *L. Wiemann Co.*, 138 F. (2d) 602, 607, (Certiorari denied, 321 U. S., 785) *Allesandro* v. *C. F. Smith Co.*, 136 F. (2d) 75, *Walling* v. *Block*, 139 F. (2d) 268, (Certiorari denied, 321 U. S., 788) *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689, *White* v. *Jacobs Pharmacy Co.*, 47 F. Supp. 298, *Walling* v. *Fred Wolferman, Inc.*, 54 F. Sup. 917, and *Chrysler Corp.* v. *Smith*, 279 Mich. 430, 298 N.W. 87, 135 A.L.R. 900, held that retail stores, general offices and warehouses constituted a single retail establishment. These decisions only gave effect to the commonly understood meaning of the word "establishment". Congress thereafter did nothing to indicate that the Courts had mis-defined the word "establishment". Then, gradually, a new thought occurred to some of the Courts—the concept of the word "establishment" as limited to a single structure. Some Courts even envisaged a small store situated within a short distance of a state line. This change in thought took place without any further suggestions from Congress than were available at the time of the earlier decisions.

Then came *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 497-8. While this Court, in the Phillips case, did refer to this change in thought, it rested its decision upon the proposition that the Phillips Company had combined the functions of retailer and wholesaler, and that, therefore, its general offices and warehouse in fact constituted a wholesale establishment, making, necessarily, its retail outlets unconnected and separate retail establishments.

The following are excerpts from the opinion of Mr. Justice Murphy:

> "The petitioner corporation operates a chain of 49 retail grocery stores * * *. Quite apart from these retail stores, petitioner maintains a separate warehouse and office building in Springfield in which work the employees involved in this case. * * * (491-2.)
>
> "It is necessary, in the first place, to understand the true nature of petitioner's warehouse and office. The prime function of petitioner's chain store system is to sell groceries at retail. Like most large chains, however, petitioner has found it economically feasible to perform and integrate *both the retail and wholesale* functions of the grocery business. The independent wholesaler or middleman *has been eliminated* from the channel of distribution of petitioner's merchandise. Petitioner not only operates the retail outlets but purchases the merchandise *in quantity from producers*, * * *. A warehouse and a central office such as petitioner maintains are vital factors in this *integration of the retail and wholesale functions*. They are necessary instruments for the successful performance of the *wholesale* aspects of a multi-function business of this type. (Emphasis supplied.)
>
> "There are, to be sure, certain distinctions between the *wholesale activities* of a chain store system and those of an independent wholesaler. * * * (Emphasis supplied.) But this and other differences that can be found arise from the fact that the chain organizations have completely meshed the retail and wholesale functions. * * * (494-5.) The disappearance of the inde-

pendent middleman, together with many of his separate operations and charges, does not mean, however, that his essential intermediary or wholesale function of moving goods from producer to retailer has been abolished. In this instance it has only been taken over by the retailer, *acting through its own distinct wholesale units.*'' (Emphasis supplied.)

Petitioner is entirely willing to have this Court compare its operations with those of the Phillips Company. Petitioner purchased 60.29% of its merchandise from wholesalers and only 39.71% from manufacturers. Of the 60.29%, 92.33% were Illinois wholesalers. Of the 39.71%, 58.81% were Illinois manufacturers. (R. 13.)

These facts entirely differentiate the present case from the Phillips case where the wholesaler had been entirely eliminated. However, the Circuit Court of Appeals failed to recognize the distinction, but clung to the arbitrary and unjustified definition of an ''establishment.''

The Courts frequently assume that, because after decisions of this Court construing an Act of Congress, Congress fails to change the law, it is an indication that Congress approves the Courts' construction. Congress did not act when the Circuit Court of Appeals for the Seventh Circuit construed the word ''establishment'' to include a chain store organization. Nor did Congress act since later decisions held otherwise.

Returning to this Court's position in the Phillips' case, holding the office and warehouse of the company to be a wholesale establishment because it had usurped the functions of a wholesaler, it is a matter of common knowledge that large department stores, retail establishments under all the decisions, with their great buying power, have combined the functions of wholesaler and retailer. For confirmation, see the Appendix hereto attached.

This situation, therefore, presents the question whether Congress has shown any intent, by the use of the word "establishment" to exempt from the operation of the Act the large department store in one state which sells up to 49% of its merchandise to customers in adjoining states, and not to exempt a smaller establishment, selling all its merchandise in intra-state commerce, 78% in its own state and only 22% in the adjoining part of a neighboring state. To so hold would not only amount to judicial legislation, but to illogical and unjust judicial legislation.

The Courts have said that the intent back of the Fair Labor Standards Act was remedial in character and, therefore, the Act should be construed liberally in favor of the employee and strictly against the employer.

The reason for the Act was to compel employers in low wage and long hour states, to gradually increase wages to 25 cents, 30 cents and 40 cents per hour, and gradually shorten hours to 44, 42 and 40 hours per work-week.

If these Southern states employers were paying their employees from 90 cents to $1.25 per hour for unskilled labor, the Act would never have been adopted or required. To hold that the word "establishment" should not be given its ordinary and usual meaning, but should be given an arbitrary and unusual meaning, not originally adopted by the Courts, in order to relieve the supposed hardships of highly paid employees, is to impute to Congress an intent that should not be assumed without basis, and should only be adopted if and when Congress, by amendment, should clearly show that it had or has such an intent.

Such a holding would impose hardships on employers in high wage states as great as, if not greater than, the hardships of the employees in low wage states, which were the only hardships sought to be alleviated by Congress.

II.

If the Word "Establishment" in Section 13(a)(2) of the Fair Labor Standards Act Should Be Limited in Meaning to a Retail Business Located in a Single Building, Said Section Would Be Unconstitutional Under the Due Process Clause of the Fifth Amendment to the Constitution and Would Be Discriminatory and Would Deny Petitioner the Equal Protection of the Law.

Section 13(a)(2) is as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to (1) * * *; or (2) any employees engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *."

As above stated, this Court and other federal courts gave to the word "establishment" its usual ordinary meaning of a business enterprise or organization. Any more restricted meaning would, obviously and necessarily, discriminate between equals and be unconstitutional.

In each of the following recited cases, all conditions are assumed to be identical—as to size, buying power, volume and source of purchases, volume of sales, number of employees, hours and wages of employees, duties of employees, and type or types of merchandise sold. The only difference is that of housing in the several cases.

Case A. The large department store where the entire business is located in one building;

Case B. Same as Case A except that the storage space for incoming merchandise, or the executive offices, or both, are located in a separate building;

Case C. Same as Case A except that, in addition to main store, there are one or more other retail selling areas located in other buildings;

Case D. Same as Case B except as provided in Case C;

Case E. A retail organization having its executive offices in one building, its storage space in another building, and two or more retail selling areas located in other buildings.

In what respect is any purpose of the Fair Labor Standards Act served by a construction which would result in exempting the employees in Case A from Sections 6 and 7 of the Act, and in not exempting the employees in any of the other cases from said sections? In Case A the employer would not have to pay overtime even if its employees worked 60 hours per week at fifty cents per hour, but in Case E the employer would have to pay overtime if its employees worked 50 hours per week at one dollar per hour.

Such discrimination certainly would violate the constitutional requirement of equal protection of the law, and intent to violate the Constitution should not be attributed to Congress in the absence of a specific declaration by Congress of the unconstitutional intent. That Congress had no such intent was the original opinion of this Court and other federal courts, and that opinion was based, and properly so, upon the well recognized principle that a legislative body, in the choice of a word, is supposed to intend its usual and ordinary meaning.

As this Court said in *Caminetti* v. *United States*, 242 U. S. 482, 485:

> "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

III.

The Sending by Petitioner from Its Own Warehouses in Chicago, by Use of Its Own Truck, to Its Own Stores in Indiana, of Its Merchandise to Be Sold at Retail in Intrastate Commerce in Indiana, Does Not Constitute Commerce or the Production of Goods for Commerce.

Many decisions under the Fair Labor Standards Act ignore the principle laid down in *United States* v. *Ohio Oil Co.*, 234 U. S. 548, 557, 562, approved in *Champlin Refining Co.* v. *United States*, 329 U. S. ....., 91 L. ed. Adv. Op. 9, 14.

In that case the question was whether the owners and operators of certain pipe-lines for the transportation of oil were common carriers and, therefore, engaged in commerce, under the Act of Congress of June 29, 1906, Chap. 3591, 34 Stat. at L. 584, amending the Act to Regulate Commerce, which amendatory, act was as follows:

> "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act."

Thereafter the Interstate Commerce Commission issued an order requiring the appellees, among others, being parties in control of pipe lines, to file with the Commission schedules of their rates and charges for the transportation of oil. 24 Inters. Com. Rep. 1. The appellees thereupon brought suit in the Commerce Court to set aside and annul the order, and for injunction on the broad ground that the statute applies to every pipe-line that crosses a state

boundary, and that thus construed it is unconstitutional. 204 Fed. 798. Five of such owners secured an injunction against the order of the Interstate Commerce Commission. The United States appealed. This Court reversed as to all the plaintiffs except the Uncle Sam Oil Company, as to which the Court affirmed. Mr. Justice Holmes, at pages 561-562, said:

> "There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe-line connecting the two which it has used *for the sole purpose* of conducting oil *from its own wells to its own refinery.* It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water *from his well to his house.* So as to oil. When, as in this case, a company is simply drawing oil *from its own wells,* across a state line to *its own refinery, for its own use,* and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end." (Emphasis supplied.)

The last sentence of the above excerpt was quoted with approval in *Champlin Refining Co.* v. *United States,* 327 U. S. ...., 91 L. ed. Advance Opinion, 9, 14.

It should be noted that the Uncle Sam Oil Company must have sold this oil, after refining, either in intrastate commerce in Kansas, or in interstate commerce in other states, or in both.

This is an exact parallel to the instant case.

Petitioner transports its merchandise from its own warehouses, in its own truck, across the Illinois-Indiana state line, to its own retail stores, for its own use, and thereafter, from time to time, such merchandise is sold in Indiana in intrastate commerce.

Petitioner does not sell from its warehouse to any

customers in Indiana, but only after the merchandise is in the Indiana store is it sold and then in intrastate commerce.

Justice Holmes' decision was good law when handed down and still is good law as shown by *Champlin Refining Co.* v. *United States,* 329 U. S. ...., and should be followed in the instant case.

IV.

The Work Performed by the Office Employees (Exclusive of the Secretary of Petitioner) Does Not Constitute Commerce or the Production of Goods for Commerce.

In *Bozant* v. *Bank of New York,* 156 F. (2d) 787, 790, the Circuit Court of Appeals for the Second Circuit correctly distinguished between the duties of an employee engaged, directly or indirectly, in the production of goods for commerce, and those of an employee engaged in clerical work not connected with the production of goods for commerce.

The Court, at pages 789-790, said:

> "* * * but it would be unreasonable to the last degree to suppose that Congress meant to cover such incidents of a business whose purpose did not comprise the production of 'goods' at all. Indeed, were it otherwise, the Act would sweep into its maw every business, however local, which manufactured nothing whatever, merely because it was carried on by correspondence, which is the case of all business." * * * (789)
>
> "To recapitulate. In so far as the Bank's business consists of preparing, executing or validating bonds, shares of stock, commercial paper, bills of lading and the like, it is engaged in 'producing goods for commerce'; * * * On the other hand, the mere writing of letters or the drawing of papers, *which have no value of their own except as records, are not to be counted.*" (790) (Emphasis supplied.)

Petitioner's office employees (other than its Secretary, not covered by the Act), under the logic of this decision, were not engaged in the production of goods for commerce, but only engaged in correspondence, telephone switchboard operation, or keeping of books, "having no value of their own except as records."

V.

The Doctrine of De Minimis Non Curat Lex Applies to This Case.

The case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692, clearly recognized that this doctrine was applicable to cases arising under the Fair Labor Standard Act. There the question was as to whether the time required for "checking in" and "checking out" shall be counted as part of the hours worked.

In the instant case, the question is as to whether an employee is engaged in the production of goods for commerce where he spends but an extremely small part of his time in connection with goods later sent to another state for intrastate sale.

The Administrator in the instant case completely failed to prove:

(a) That any warehouse employee ever helped the driver of an incoming truck in unloading goods that came from without the State of Illinois;

(b) How much time was expended by any employee, or by what employee, in rendering such assistance;

(c) How much time was expended by any employees, or by what employee, in handling goods that later were sent to Indiana.

Petitioner, in its "Statement of the Matter Involved" has analyzed the evidence and made the only deductions possible in view of the lack of definite proof. This ana-

lysis shows that less than one-tenth of one per cent of the time of any warehouse employee was connected with merchandise coming from without the State of Illinois, and ultimately delivered to Indiana, and that less than two per cent of any warehouse employee's time was connected with merchandise, ultimately delivered to Indiana.

In this situation, the *de minimis* doctrine should be held to apply. To hold otherwise would be to give to Congress an intent to turn the Fair Labor Standards Act into a technical criminal statute. This is inconceivable.

Indeed, Congress clearly indicated that an employee should not be deemed to be engaged in commerce or in the production of goods for commerce where only a minor part of his time was connected with commerce. Under Section 13(a)(2) the employee can be so engaged for 49 per cent of his time and still be exempt. So it cannot be said, in the one case, that an employee employing 49 per cent of his time in connection with commerce would not be covered by the Act, while, in another case, an employee employing only a small part of his time in such connection would be covered. The latter employee should not be held to be covered by the Act, apart from the *de minimis* doctrine, and certainly should not be so held in view of that doctrine.

VI.

The Administrator Did Not Sustain the Burden of Proof.

The amended complaint, of course, alleged that Petitioner's office and warehouse employees were engaged in commerce and that Petitioner had *repeatedly* violated section 7 and 13(a)(2) of the Act. (R. 3.)

The answer put these allegations in issue and alleged that if there had been any employment in commerce, it

was purely incidental to Petitioner's intrastate business. The answer also admitted that, *on occasion*, some of its employees *may have* worked overtime, and that Petitioner had not, *in all cases*, paid overtime. The Stipulation of Facts stated that overtime was not paid. (R. 7-8.)

In this state of the pleadings, it was incumbent upon the Administrator to prove, by a preponderance of the evidence, the following:

1. That the office and warehouse employees in fact were engaged in commerce or in the production of goods for commerce;

2. That such employees in fact worked overtime; and

3. That Petitioner repeatedly violated the Act by not paying overtime.

The Administrator did none of these things. All that the record shows is the type of employee, the duties of such employee, that some of the incoming merchandise came from without the state, and that some of the merchandise was distributed to the Indiana store by Petitioner's truck driver who was expressly excluded in the relief sought and granted. There was no evidence that any employee ever worked overtime. There was no evidence that any incoming interstate shipment was unloaded with the assistance of any employee. There was no evidence that any part of any incoming interstate shipment was ever sent to Indiana. In short, the Administrator not only did not prove any *repeated* violations, but failed to prove any violations. And yet the injunction granted by the District Court was affirmed by the Court of Appeals.

Conclusion.

Petitioner respectfully submits that each of the above points, taken singly, is of such importance, not only to Petitioner, but to the business world, as to warrant the bringing of this case to this Court, and much more so when taken together.

WHEREFORE, your Petitioner respectfully requests that a Writ of Certiorari be directed to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision made by that Court in the case of *Blue Star Auto Stores, Inc.* v. *William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.*

SAMUEL E. HIRSCH,

JULIAN H. LEVI,
Counsel for Petitioner.

APPENDIX.

The following quotation appears at page 223 of "Retailing Principles and Methods", revised edition 1947, by Duncan and Phillips, published by Richard D. Irwin, Inc. of Chicago:

> "(3) *Importance of manufacturer as a resource:* The foregoing discussion of factors encouraging sale directly between manufacturer and retailer suggests that the importance of direct sale varies according to the size of the retailer and the type of merchandise carried. The location of the retailer is still another consideration. Large department stores, mail order companies and chain stores negotiate directly with manufacturers for a large part of their purchases—perhaps for 75 per cent or more."

The same statement, except for the last phrase mentioning "75 per cent or more" also appeared in the 1941 edition of the same text book.

Mr. Duncan is Professor of Marketing at Cornell University, formerly of Northwestern University.

Mr. Phillips is President of Bates College in Maine.

This is a standard text book used by Prof. George Hay Brown, Professor of Marketing in the School of Business at the University of Chicago.

The following is a copy of a letter received by petitioner's counsel from Prof. Ira D. Anderson, Associate Professor of Marketing, School of Commerce, Northwestern University:

> "In reply to your inquiry regarding the buying methods of department stores, it is my opinion that most large department stores buy much more than half of their purchases directly from manufacturers or through direct manufacturers' representatives, as contrasted with buying from wholesale merchants or jobbers."

The following is a copy of a letter, dated December 9, 1947, received by Petitioner's counsel from Mr. Bert Fishel, Vice President and General Merchandise Manager of Mandel Brothers, a large department store in Chicago:

> "Answering your inquiry, we wish to advise you that our records indicate that we purchase approximately 90% of our merchandise directly from manufacturers."